

Khateri (Migration) [2019] AATA 3679 (4 July 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Ferozah KHATERY

VISA APPLICANTS: Mrs Tahira Ahmad KHATERY
Miss Sabira KHATERY
Miss Roya KHATERY
Miss Zahra KHATERY
Miss Nargis KHATERY
Miss Kawsar KHATERY

CASE NUMBER: 1702786

DIBP REFERENCE(S): BCC2015/274287 OSF2014022860

MEMBER: Mireya Hyland

DATE: 4 July 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the visa applicants meet the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.31 of Schedule 2 to the Regulations
- cl.309.321 of Schedule 2 to the Regulations

Statement made on 04 July 2019 at 8:47pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional) – family unit – applicants rely on relative for financial support to meet basic needs – sole source of support went missing – high risk of reprisal for Afghan female workers – document fraud – decision under review remitted

LEGISLATION

Marriage Act 1961 (Cth), s 88D(3)

Migration Act 1958 (Cth), ss 5, 65, 499

Migration Regulations 1994 (Cth), rr 1.03, 1.05A, 1.12, 2.03A(2), Schedule 2, 300.311, 309.312, 309.321

CASES

Hafza v Director General of Social Security(1985) 6 FCR 444

Huynh v MIMA [2006] FCAFC 122

Koitaki Para Rubber Estates Limited v The Federal Commissioner of Taxation (1941) 64 CLR 241

Re Taylor (1992) 37 FCR 194

Thompson v MIAC [2009] FMCA 1210

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 December 2016 to refuse to grant the visa applicants, Mrs Tahira Ahmad Khatery and her daughters, Sabira, Roya, Nargis, Zahra and Kawsar Khatery, Partner (Provisional) (Class UF) Subclass 309 visas under s.65 of the *Migration Act 1958* (the Act).
2. Mrs Khatery and her five daughters applied for the visas on 29 December 2014 based on her son's, Mohammad Sabir Khatery's, marriage to his sponsor, Ms Ferozah Khatery. At that time, Class UF contained one subclass: Subclass 309 (Partner) (Provisional). The criteria for the grant of the visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). On 7 December 2016, the delegate granted Mr Khatery a Subclass 309 visa. Mrs Khatery's and her daughter's visas were refused on the basis that they did not satisfy cl.300.311 because they were not dependent on, and, therefore, members of the family unit of, Mr Khatery. Ms Khatery applied to the Tribunal for review of the decision on 17 February 2017.
3. The delegate interviewed Mr and Ms Khatery on 4 October 2016 by telephone. Ms Khatery, who currently resides in Afghanistan, appeared before the Tribunal by telephone on 27 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Khatery and a cousin, Mr Abdul Ahmed Ali Mohammad. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The Khaterys were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.
4. The issue in the present case is whether Mrs Khatery and her daughters are members of Mr Khatery's family unit. For the following reasons, the Tribunal has concluded that the decision under review should be remitted.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The Khaterys, who are Shia Hazaras, are citizens of Afghanistan from Parwan province who have lived in Kabul since 2004. Mr Khatery is Mrs Khatery's oldest child, born in 1992. DNA tests show that Mrs Khatery's daughters Sabira (born in 1999), Roya (born in 2001), Nargis (born in 2002), Zahra (born in 2007), and Kawsar (born in 2013) are all Mr Khatery's sisters. Sabira's twin sister, Alina, also applied for a Subclass 309 visa that was refused and was initially part of this review application, however she withdrew from the review application when she married in 2018.
6. Mrs Khatery's husband, Ahmad Ali, owned a clothing shop in Kabul and was the family's sole source of support prior to his disappearance in 2013. According to Mr Khatery, Mr Ali was traveling from Kabul to his home village in the Turkman Valley, Parwan in his car when he went missing. Mr Khatery told the Tribunal that the Hazara area in Parwan where Mr Ali was going, which would have been on the way to and at the very outermost edge of the Hazarajat,¹ is surrounded by Pashtun areas and Hazaras in Afghanistan are discriminated against. When Mr Ali failed to return to Kabul, Mr Khatery checked to see if he had arrived in the village and, finding that he had not, contacted the police in that area. The police said they did not have any information about an incident on the road, but would contact Mr

¹ The traditional homeland of the Hazaras is the Hazarajat, a mountainous region consisting of the provinces of Bamiyan and Daykundi and parts of the provinces of Ghazni, Ghor, Uruzgan and Wardak: DFAT, *Country Information Report Afghanistan*, 31 July 2013, section 2.3; the western edge of Parwan province, which is predominately Pashtun, sits next to Bamiyan province.

Khatery if they found out anything. They did not contact Mr Khatery. After Mr Ali's disappearance Mr Khatery took over the clothing shop and became the sole source of support for his mother and sisters. Mr Mohammad also gave evidence at the hearing about his personal experiences related to Mr Ali's disappearance.

7. According to the delegate's decision, Mr Ali appears as a witness attesting to the marriage of Ms Khatery's brother, Jawed Ali Khatery, with a thumb print on the marriage certificate dated 28 September 2014. Jawed Ali Khatery confirmed to the Department of Home Affairs (DOHA) during an interview for his wife's partner visa on 16 November 2016 that Mr Ali appeared as a witness on their marriage certificate. Mr and Ms Khatery told the delegate that Jawed Ali Khatery used a photograph of Mr Ali, together with his property ownership paperwork, and someone else placed his thumbprint on the certificate. When asked about any deeds that might exist for the house owned by Mr Ali, Mr Khatery told the Tribunal that there was no property ownership paperwork. Everyone in the area knows that Mr Ali owned the house where the Khaterys live and that the property now belongs to Mr Khatery.
8. Ms Khatery, who was in Afghanistan in September 2014, told the Tribunal that her brother came and asked that her husband urgently assist him by witnessing something he needed before his imminent return to Australia. She said in Afghanistan it was sufficient to show a picture of the witness and his *taskira*². Mr Khatery was not at home and when Jawed Ali Khatery called him at the shop he was too busy to get away and help. Mrs Khatery had Mr Khatery's picture, but Mr Khatery had his *taskira* with him. However, Mrs Khatery had a picture of her husband and Mr Ali's *taskira*. Therefore, she gave these to Jawed Ali Khatery. Ms Khatery stated that her brother did not tell them that it was his marriage certificate that he needed witnessed so it could be registered and provided to DOHA. She said they thought it was just for something in Afghanistan and if they had known it was going to be used in Australia they would never have given Jawed Ali Khatery Mr Ali's *taskira* and picture.
9. Mr Khatery sold the clothing shop for USD20,000 and, on 17 February 2017, entered Australia as the holder of a Partner (Migrant) (Class BC) Subclass 100 (Partner) visa. He returned to Kabul on 19 April 2017 and on 21 June 2017 Ms Khatery and the couple's first child departed Australia to join her husband in Kabul. Mr Khatery returned to Australia on 20 October 2017 for nine months to earn money to support the family. That money was sent to Mrs Khatery because it is easier for her to leave the house alone. The younger women in the family would encounter harassment if they tried to collect the money. Ms Khatery has not returned to Australia since departing in 2017 and the couple now have a second child. Mr Khatery visited Kabul from 22 July 2018 until 23 September 2018. He has continued to send money to his mother to support the Khatery family. The Khaterys claim Mrs Khatery and her daughters have no other source of support. Mr Khatery told the Tribunal that women cannot work in Afghanistan. His sisters spend their time going to school.

Country Information

10. The Department of Foreign Affairs and Trade (DFAT) has prepared a number of Country Information Reports in relation to Afghanistan for protection status determination purposes pursuant to Ministerial Direction Number 56 of 21 June 2013 under s 499 of the Act. The Tribunal has considered these reports when determining the credibility of Mr and Ms Khatery's claims about the situation in Afghanistan, the disappearance of Mr Ali, and the Khatery family's ability to work in Kabul. These reports are based on DFAT's on-the-ground knowledge and discussions with a range of sources in Afghanistan, including the Afghan government, human rights organisations, civil society activists, UN agencies, and representatives of the international community. They take into account relevant and credible open source reports, including those produced by the US State Department, UK Home

²a certificate that is the most common form of identification in Afghanistan: DFAT, *Country Information Report Afghanistan*, 18 September 2017, pg. 3.

Office, World Bank, Chatham House, Transparency International, Amnesty International, Human Rights Watch, Freedom House, Reporters Without Borders, the Committee to Protect Journalists, UN agencies, credible news sources, and certain protected sources. The reports provide the following information about Hazaras, Afghanistan's security situation and travel security in around 2013, employment in Kabul, and women in Afghanistan.

Hazaras

11. Ethnic, tribal and family affiliations are important factors in almost every aspect of life in Afghanistan. For the majority of Afghans, this kinship is central to identity and acceptance in a community, including for finding shelter and employment. As such, Afghans prefer to live in areas where their ethnic group constitutes the local majority. Outside of major urban areas, most Afghans are organised into ethnic-based communities with their own traditions and customs. Even within ethnically-mixed urban areas, Afghans tend to live alongside members of their own ethnic group.³
12. Hazaras face widespread societal discrimination, particularly in areas where they do not constitute the local majority. In April 2013, the US State Department reported that such discrimination existed 'along class, race and religious lines in the form of extortion of money through illegal taxation, forced recruitment and forced labour, physical abuse and detention.' At the time there was a general increase in anti-Hazara sentiment.⁴ In 2014, DFAT assessed that insurgents generally did not target individuals solely on the basis of ethnicity and no particular ethnic group was disproportionately subject to violence. However, ethnicity or religion was sometimes a contributing factor.⁵ The historical enmity between Afghanistan's Hazara and Pashtun communities, particularly during the Taliban regime, contributed to the Hazara community's uncertainty about the security situation in Afghanistan before the International Security Assistance Force (ISAF) drawdown in 2014.⁶
13. Hazaras have traditionally placed a high value on educational achievement, including for girls. Hazaras operate a number of private schools in Kabul for the benefit of their community. The quality of these schools tends to be higher than many other schools in Afghanistan, demonstrated by relatively high university acceptance rates.⁷

Security Situation

14. There are countless people missing in Afghanistan because of the continuing armed conflict and decades of civil war, and there continue to be reports of disappearances, including those that have been attributed to Afghan security forces. DFAT has been unable to provide additional information in this regard.⁸ But in 2013 and 2014, insurgent groups, including the Taliban, the Haqqani Network, Hezb-e-Islami Gulbuddin Hekmatyer and others, remained engaged in a violent armed conflict against the Government and its international partners. In addition to these anti-government insurgent groups, there was also a number of other local non-state militias operating within Afghanistan that existed for the protection of particular groups, but were not necessarily hostile to the Government.⁹ There were many areas of the country contested by insurgent forces and no part of the country could have been considered totally free from conflict-related violence.¹⁰

³ DFAT, *Country Information Report Afghanistan*, 26 March 2014, sections 3.1.

⁴ DFAT, *Country Information Report Afghanistan*, 31 July 2013, sections 3.8-3.12.

⁵ DFAT, *Country Information Report Afghanistan*, 26 March 2014, sections 3.4.

⁶ DFAT, *Country Information Report Afghanistan*, 26 March 2014, sections 3.13.

⁷ DFAT, *Thematic Report Hazaras in Afghanistan*, 18 September 2017, section 2.15-2.16.

⁸ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 4.7.

⁹ DFAT, *Country Information Report Afghanistan*, 26 March 2014, section 2.27.

¹⁰ DFAT, *Country Information Report Afghanistan*, 26 March 2014, section 2.29.

15. In 2013, the UN Assistance Mission in Afghanistan (UNAMA) documented 2959 civilian deaths and 5656 injuries due to conflict, a 14 per cent increase in total civilian casualties compared to 2012. UNAMA attributed 74 per cent of civilian deaths and injuries to anti-government elements, 11 per cent to Government and ISAF soldiers, 10 per cent to engagement between pro- and anti-government forces, and five per cent to other sources. Violence from criminal groups and insurgents could be difficult to differentiate with documented cases of abductions and killings by both, including while travelling by road. Wealthy or high-profile individuals, or those openly identified as working for the Government, were at higher risk of kidnap for ransom.¹¹
16. Significant international donor work has gone into turning the Afghan National Police (ANP) into a credible, professional and effective police force, including through providing extensive training on human rights. However, credible reports of serious human rights abuses committed by ANP members have continued to occur, including allegations of intimidation, extortion, torture, and sexual abuse. The ability of the ANP to provide and maintain security and law and order is constrained by a number of factors, including lack of resources, poor training and leadership, low morale, and high levels of corruption. The majority of ANP members are either illiterate or have very low levels of literacy.¹²

Travel Security

17. In or around 2013, Afghanistan's road network, particularly in the mountainous central highlands, was generally poor. Travel in winter was even more difficult and roads at higher altitudes could be cut by snowfalls for long periods during winter. Speeding and unsafe driving further aggravated the problem with the majority of deaths on Afghan roads caused by traffic accidents. Insecurity compounded the poor condition of Afghanistan's limited road network, particularly those roads that pass through areas contested by insurgents. Taliban and criminal elements targeted the national highway and secondary roads, setting up arbitrary armed checkpoints. Official ANP and Afghan National Army (ANA) checkpoints designed to secure the road were sometimes operated by poorly-trained officers known to use violence to extort bribes. More broadly, criminals and insurgents on roads targeted all ethnic groups.¹³ While individuals were not targeted solely on the basis of ethnicity or religion, Hazaras are likely to be selected for abduction or violence if a vehicle with a mix of ethnic groups is stopped. Hazaras travelling to and from the Hazarajat are particularly at risk in this regard.¹⁴

Employment

18. Paid employment in Afghanistan is heavily male-dominated. The World Bank last measured the labour force participation in 2014, putting the male labour force participation (aged 15 and above) at 79 per cent compared to only 15.9 per cent for women of the same age. Most paid workers, more than 80 per cent, work in vulnerable employment, characterised by insecure work arrangements, volatile earnings, and low productivity.¹⁵ While there are no reliable statistics, it is generally agreed that unemployment is widespread in Kabul and underemployment is common. The influx of internally displaced persons (IDPs) and asylum-seeker returnees to the city has put pressure on the local labour market. Over the last decade, employment growth has been strongest in Kabul's service sector, including small businesses, such as family-owned markets, and in the construction industry. Due to the

¹¹ DFAT, *Country Information Report Afghanistan*, 26 March 2014, sections 2.31-2.32.

¹² DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 5.6.

¹³ DFAT, *Thematic Report Hazaras in Afghanistan and Pakistan*, 26 March 2014, sections 4.22-4.23.

¹⁴ DFAT *Thematic Report Hazaras in Afghanistan*, 18 September 2017, section 2.35.

¹⁵ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 2.21.

significant military and government presence in Kabul, there are also employment opportunities in the armed forces and the civil service.¹⁶

19. Although it is difficult for women to find employment in Kabul, there tend to be more opportunities in Kabul compared to other parts of Afghanistan. However, female-headed households with no additional family support tend to be among the most economically vulnerable groups in Kabul.¹⁷

Women

20. Women's formal rights to education and employment were restored following the end of Taliban rule and in most respects women are legally able to openly participate in public life. However, women continue to face significant societal discrimination and violence.¹⁸ The Constitution provides a number of guarantees in relation to women's rights, including equality before the law, the right to an education, and the right to work. There are also constitutional provisions for ensuring women's political representation, including through presidential appointment.¹⁹ Although there have been significant improvements since 2001, in practice, women in Afghanistan continue to experience pervasive discrimination in most aspects of daily life which frustrates their pursuit of their personal, economic, social and cultural rights.²⁰
21. DFAT assesses that the majority of Afghan women, regardless of ethnicity or socio-economic status, face a high risk of official discrimination and a high risk of societal discrimination. Long-standing traditional values and gender roles continue to significantly restrict women's participation in the community and workforce, in both the public and private sectors. DFAT assesses that Afghan women face a high risk of gender-based violence, including sexual assault. Afghan women working outside the home, in non-traditional areas such as policing or security, or in areas advocating women's rights, face a high risk of violence, including targeted killings. Afghan women are particularly vulnerable to the effects of the continuing armed conflict, and face an elevated risk of conflict-related death or injury.²¹
22. In June 2015, the government launched a National Action Plan to implement UN Security Council Resolution 1325 on Women, Peace and Security, although implementation was not complete as of August 2017 when the last DFAT report was finalised. Despite various laws providing for the participation of women in public and social life, discrimination against women remains systemic and pervasive and flows through to the administration of the entire public sector. For example, only 2,500 out of 150,000 police are women. For cultural and customary reasons, male family relatives generally accompany female police officers when they undertake their training.²²
23. While women's rights have improved significantly since the end of the Taliban regime, which comprehensively and unequivocally excluded women from public life, women's place in society remains deeply contentious. Parliament rejected the first female nominee to the Supreme Court in July 2015 following objections from conservative groups, including female members of Parliament. Societal, cultural and religious barriers continue to considerably limit the extent to which women are able to participate in Afghan society, as does socio-economic status and geographic location. Anti-government elements have also targeted women active

¹⁶ DFAT, *Thematic Report: Conditions in Kabul*, 18 September 2015, p.5.

¹⁷ DFAT, *Thematic Report Conditions in Kabul Afghanistan*, 3 October 2014, section 2.14.

¹⁸ DFAT, *Country Information Report Afghanistan*, 31 July 2013, sections 3.36.

¹⁹ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 3.36-3.40.

²⁰ DFAT, *Country Information Report Afghanistan*, 26 March 2014, sections 3.38.

²¹ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 3.47.

²² DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 3.36-3.40.

in public life and women employed in non-traditional sectors such as policing and security, limiting their ability to participate in these areas for fear of reprisal.²³

24. DFAT assesses that, although women and girls in Kabul may be subject to some kinds of violence, particularly domestic violence, there tends to be a higher level of security for them in Kabul than in many other parts of Afghanistan.²⁴ Hazaras are regarded as progressive by Afghan standards in relation to women's rights. Hazara girls are far more likely to be able to access education than girls are of other ethnicities. Hazara women and girls are also far more likely to be able to participate in sport and the workforce than women and girls of other ethnicities. Because of their educational qualifications and the support of their community, Hazara women are particularly likely to be able to pursue employment opportunities with the international community, or with the government, police and army. However, Hazara women and girls living outside the Hazarajat are subject to the same societal restrictions as other Afghan women. They experience high levels of societal discrimination and gender-based violence, including sexual assault and domestic violence, irrespective of where they live. All Afghan girls attending school face a risk of violent attack, although this risk is likely to be lower for Hazara girls attending schools in the Hazarajat.²⁵

Ahmad Ali

25. In large part this case turns on whether Mr Ali has been missing since 2013. If he is missing it is far more likely that Mr Khateri has been supporting his family for the last six years. If, however, he is not missing, it is most likely that Mr Khateri is supporting his wife and children, and possibly contributing to the rest of the household, but is not Mrs Khateri and her children's main source of financial support. The inconsistent evidence that Mr Ali witnessed Jawed Ali Khateri's marriage certificate in September 2014 is the primary stumbling block to the claim that he went missing in 2013.
26. The Tribunal has significant concerns about Mr and Ms Khateri's evidence around how Mr Ali ended up as a witness on Jawed Ali Khateri's marriage certificate. Their explanation that they were willing to aid Ms Khateri's brother in manufacturing a false witness does nothing to alleviate the Tribunal's concerns about their honesty. The Tribunal does not accept their explanation that they did not know what Ms Khateri's brother was going to use Mr Ali's photo and *taskira* for, or that they would not have given them to him if they had known it was for use in Australia and not just Afghanistan. If they really cared about those things they could easily have asked Jawed Ali Khateri those questions, but they did not. The explanation is particularly unpersuasive since they would have known that he was in Afghanistan putting together his wife's off-shore spouse visa application and they knew what documentation was required having recently lodged their own. As the Tribunal pointed out to Mr Khateri at the hearing, even if the explanation is true it does not excuse their part in Jawed Ali Khateri's fraud, or support that they are witnesses of truth who should be believed when claiming Mr Ali went missing in 2013.
27. That said, the explanation for Mr Ali's name being on the marriage certificate is not implausible. Document fraud is a major issue in Afghanistan. Because the process for obtaining some documents is decentralised to the provincial level, and because the documentation itself generally does not contain robust security features, the system is vulnerable to fraud. Genuine documents can be issued on the basis of false information, with supporting forms of documentation such as school, academic, or banking records easily forged.²⁶ Also, around 80 per cent of marriage contracts in Afghanistan are not validly

²³ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 3.36-3.40.

²⁴ DFAT, *Thematic Report Conditions in Kabul Afghanistan*, 3 October 2014, section 2.31.

²⁵ DFAT, *Thematic Report Hazaras in Afghanistan*, 18 September 2017, section 3.14-3.15.

²⁶ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 5.27.

registered. Generally, a married couple deems the social recognition of their marriage sufficient. The registration of marriage is only considered when a marriage certificate is required for litigation or for presentation to a foreign government for the purpose of international travel.²⁷

28. These two circumstances viewed together lead the Tribunal to accept that the Khaterys' claim that in Afghanistan the expediency of using false information to acquire genuine documents is common, if not rampant, is true. Although it does not find it acceptable that Ms and Mrs Khatery participated in the deceptive behaviour perpetrated by Ms Khatery's brother for an Australia migration application, the Tribunal finds that it does explain the discrepancy.
29. When all the country information about the security situation and Hazaras in Afghanistan in 2013 is viewed together with the fact that Mr Khatery remains separated from his wife and children and the amounts of money he is remitting to Kabul, the Tribunal believes Mr Ali did go missing in 2013 and his photo and *taskira* were used to fraudulently acquire the marriage certificate to register.

Are the Khaterys Members of Mr Khatery's Family Unit

30. Clause 309.311 of the regulations requires that at the time of the application the applicant is a member of the family unit of, and made a combined application with, a person who satisfies the primary criteria in Subdivision 309.21. Clause 309.321 requires that at the time of decision the applicant continue to be a member of the family unit of that person. Since Mr Khatery is the person who satisfies the primary criteria, to satisfy the Regulations Mrs Khatery and her daughters must be members of his family unit at the time of application and at the time of this decision.
31. Regulation 1.12 sets out the definition of '*member of the family unit*'. Relevantly, at r.1.12(1) (e), it states that a person is a member of the family unit of another person (in the subregulation called 'the family head') if the person is a '*relative*' of the family head or of the spouse of the family head. The relative must not have a spouse or de facto partner, must be usually resident in the family head's household, and must be dependent on the family head.

Relatives

32. To be a relative the Khaterys must meet the definition in r.1.03 of the Regulations. Relevantly, it states a '*relative*' includes a '*close relative*', which is further defined at (b) as including a parent and a sister of the person. Therefore, in light of the DNA evidence referred to in the delegate's decision, at the time of application and at the time of decision Mrs Khatery and her daughters were all relatives of Mr Khatery, the family head.

No Spouse or De Facto Partner

33. What constitutes a spouse or de facto partner for the purposes of the Act is defined in s.5F and s.5CB respectively. A couple must be in a genuine and continuing relationship with a mutual commitment to a shared life to the exclusion of all others, and they must be living together or not living apart on a permanent basis. The Tribunal has found that Mr Ali disappeared in 2013. It also accepts that it was generally accepted in the area that Mr Khatery inherited his father's property allowing him to sell the clothing shop in 2017. Since Mrs Khatery's husband has not been seen or heard from since 2013 and has not lived with her for over six years, the Tribunal accepts that she does not have a spouse or de facto partner as defined in the Act. It further finds that, in light of that evidence, in retrospect it can

²⁷DOHA, Dubai Integrity Unit Information Report 297/2013 issued by Dubai Integrity Unit Afghan Marriage Certificate, 1 March 2016.

safely say that Mrs Khateri did not have a spouse or de facto partner when the application was lodged on 29 December 2014, although that may not have been clear at that time.

34. The Tribunal accepts Ms Khateri's evidence that Sabira, Roya, and Nargis, who are 20, 18 and 17 years of age respectively, do not have spouses or de facto partners.²⁸ When Sabira's twin, Alina, married she withdrew from the application. Therefore, the Tribunal finds that the Khateris have been honest about the relationship status of the secondary applicants. Because a spouse must be at least 16 years old and a de facto partner must be at least 18 years of age, Zahra, who is 12, and Kawsar, who is 6, are too young to have a spouse or de facto partner for the purposes of the Act: s.5F(2)(a) and s.12 of the Act, s.11, s.12 and s.88D(3) of the Marriage Act 1961; r.2.03A(2) of the Regulations.
35. Based on the findings above, the Tribunal finds that at the times of application and decision Mrs Khateri and her daughters met and continue to meet r.1.12(1)(e)(i) of the Regulations.

Usually Resident in Mr Khateri's Household

36. According to DOHA's records Mr Khateri arrived in Australia on 17 February 2017. He returned to Kabul on 19 April 2017 and stayed for six months before returning to Australia at the end of October 2017. Mr Khateri returned to Kabul in July 2018 and stayed for two months. He has been in Australia for the last eight months. He told the Tribunal he will be returning to Kabul as soon as possible. Mrs Khateri, her five daughters, Ms Khateri, and her two children live at No. 200, Street No. 12 in Qal-e-Fathullah Khan, District 10, Kabul in Afghanistan (the Kabul house). It is clearly their usual residence. Since Mrs Khateri and her daughters must be usually resident in Mr Khateri's household, the question arises whether the Kabul house is Mr Khateri's household?
37. The term '*household*' is not defined in the Act or Regulations and should be given its ordinary meaning, which may be distinct from '*residence*'.²⁹ The Macquarie Dictionary defines the noun '*household*' as 'the people of a house collectively; in previous times, a family, including servants, etc.; a domestic establishment'. To satisfy r.1.12(1)(e)(ii) the domestic establishment must be the family head's, that is, Mr Khateri must be one of the people of the house collectively. The Kabul house must be Mr Khateri's domestic establishment. Although there are no ownership papers, based on the statement from the family's local Imam, Haji Shaikh Nazir Hussain Hussaini from the Grand Mosque of Mohammad Baqir also located at Street No. 12 in Qal-e-Fathullah Khan, the Tribunal accepts that Mr Khateri inherited the Kabul house from his father and now owns it. For the reasons set out below it accepts that he alone provides the funds to maintain the house and is the sole source of support for all the people living there. But this alone is not sufficient to establish that the Kabul house is where he has his '*household*'. Therefore, although '*household*' may be distinct from '*residence*', where Mr Khateri resides is relevant since, although not unfathomable, it would be an unusual circumstance that a person would maintain a household in a place where he or she does not reside.
38. An individual's place of residence is determined, not by the situation of property, but by reference to where the person eats and sleeps, and has his or her settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situated. But he may also reside where he habitually lives even if it is a hotel or yacht or

²⁸ The marriageable age in Australia is 18, but the Afghan Family Law (1976) allows women to marry at age 16: s.11 of the *Marriage Act 2016*, DFAT, *Country Information Report Afghanistan*, 27 June 2019, section 3.22; Foreign marriages where neither party was domiciled in Australia at the time of the marriage involving a person under 18 are recognised as valid if the person is at least 16 years old: s.88D(3) of the *Marriage Act 1961*.

²⁹ *Thompson v MIAC* [2009] FMCA 1210 (Emmett FM, 7 December 2009) at [21]-[24].

some other place of abode.³⁰ The court in *Hafza v Director General of Social Security*³¹ held that 'residence' includes two elements: physical presence in a particular place and the intention to treat that place as home at least for the time being, not necessarily forever. Once a person has established a home in a particular place, even if involuntary, the person does not necessarily cease to be resident there because he or she is physically absent. The test is whether the person has retained a continuity of association with the place and, together with an intention to return to that place, an attitude that that place remains 'home'.³²

39. Some people, in the ordinary pursuit of their lives, regularly, or customarily, live in more than one place, each of which has an element of permanence about it and is not merely a place of casual or intermittent resort. Therefore, people can be resident in more than one country at the same time.³³ While application of the general concept of residence depends on the words and purpose of the statute, where the general concept is applicable, residence of a place in which a person is not physically present depends upon an intention to return and to continue to treat that place as 'home'. Likewise, a change of intention may be decisive of the question whether residence in a particular place has been maintained.³⁴
40. Mr Khatery has a home, a job, and has spent the majority of his time since February 2017 in Australia. Therefore, he clearly resides and has a household in Australia. However, the Tribunal notes that, not only does he own the Kabul house, which, unlike the clothes shop, he did not sell when he moved to Australia, but he has regularly returned to live in there. It is also relevant that his Australian wife and children have lived in the Kabul house since 2017 while Mr Khatery has lived in Australia alone. When asked why he had not returned to Kabul since September 2018, Mr Khatery told the Tribunal he was forced to spend more time in Australia, away from his family, than he would like for financial reasons. The country information about the employment situation in Kabul supports this claim.
41. Mr Khatery grew up in the Kabul house and it has always been his home. Being his established home, he does not necessarily cease to be resident there after 26 years just because he is physically absent. The test in *Hafza* is whether he has retained a continuity of association, an intention to return, and an attitude that it remains 'home'. Mr Khatery came to Australia in February 2017 to establish his Australian residency and then moved his wife and child to the Kabul house where he lived with them for six months. He then returned to Australia to work, but the Kabul house is his abode when he is in Kabul which is as often as he can afford. Although he spent more time in Australia in 2018, he spent more time in Afghanistan in 2017. He has not yet travelled to Kabul in 2019 for financial reasons, but is planning to do so. His absence from Kabul for work over the last eight months does not mean the Kabul house does not remain his home. Work is one of the most common reasons why a person can have two residences.
42. Although Mr Khatery intends to eventually relocate his family to Australia, the Tribunal accepts that until he can bring his mother and sisters his intention is that the Kabul house will remain one of his homes at least for the time being. The Tribunal finds that despite the fact that he spends most of his time in Australia, Kabul is not merely a place of casual or intermittent resort for Mr Khatery. He could have his wife and children with him in Australia, but has chosen to base them in Kabul with his mother and sisters. Both his residence in

³⁰*Koitaki Para Rubber Estates Limited v The Federal Commissioner of Taxation* (1941) 64 CLR 241 at 249.

³¹ (1985) 6 FCR 444; [1985] FCA 164.

³²*Hafza v Director General of Social Security* (1985) 6 FCR 444 at [449]-[450] citing *Inland Revenue Commissioners v Lysaght* [1928] AC 234 at 248, *Keil v Keil* [1947] VLR 383, *Levene v Inland Revenue Commissioners* [1928] AC 217 at 225, *Judd v Judd* (1957) 75 WN (NSW) 147 at 149, and *Norman v Norman* (1969) 16 FLR 231 at 236.

³³*Re Taylor* (1992) 37 FCR 194; also see *Hafza v Director General of Social Security* (1985) 6 FCR 444; [1985] FCA 164.

³⁴*Hafza v Director General of Social Security* (1985) 6 FCR 444 at [450]-[451].

Australia and in Afghanistan has had and continues currently to have the requisite element of permanence. The Tribunal accepts that Mr Khaterly intends to return to the Kabul house and continues to treat it as home.

43. The Tribunal finds that Mr Khaterly's usual residence is Australia, but that does not mean it is his only residence. It finds that, considering the test in *Hafza*, Mr Khaterly also resides in Afghanistan. The Regulations do not require that his relatives reside in the family head's usual residence. They only require that Mrs Khaterly and her daughters be usually resident in Mr Khaterly's household. There is nothing in the ordinary meaning of the word 'household' that would limit Mr Khaterly to only one household or to his household only being his usual residence. If Mr Khaterly can be resident in more than one place then it must be that he can maintain a household in each of those places. As Lockhart J observed in *Re Taylor*³⁵ when considering having two places of residence, a person 'cannot be physically present in both at the same time, but he may be resident (or ordinarily resident) in each at the same time.' The Tribunal can think of no reason why the same cannot be said for the households the person maintains in those two places of residence. The Tribunal finds that on all the evidence the Kabul house is one of Mr Khaterly's households.
44. Based on the findings above the Tribunal finds that at the times of application and decision Mrs Khaterly and her daughters were and continue to be usually resident in Mr Khaterly's household and meet r.1.12(1)(e)(ii).

Are the Khaterlys Dependent on Mr Khaterly

45. The term '*dependent*' is defined in r.1.05A of the Regulations. It requires that at the relevant time, and for a substantial period immediately before that time, the person who is claiming to be dependent (the 'first person') must be wholly or substantially reliant on the other person (the family head) for financial support to meet her basic needs for food, clothing and shelter. Further, the first person's reliance on the family head must be greater than her reliance on any other person or source of financial support to meet those basic needs: r.1.05A(1)(a)(ii) and (ii). Alternatively, the first person must be wholly or substantially reliant on the family head for financial support because she is incapacitated for work due to the total or partial loss of her bodily or mental functions: r.1.05A(1)(b). There is no evidence, and it is not claimed, that the secondary applicants are incapacitated for work for any reason.
46. The terms of r.1.05A(1) do not carry with them any implication of necessity or lack of choice. The question is whether, as a matter of fact, the first person is relying on the family head for support.³⁶ That said, the claim is that Mrs Khaterly and her daughters are completely financially reliant on Mr Khaterly, not only for their basic needs for food, clothing and shelter, but for everything, because of the circumstances in which they live. The country information would appear to support this claim. The Khaterlys claim that since Mr Ali's disappearance in 2013 Mr Khaterly has been Mrs Khaterly's and her daughters' sole source of support. Prior to coming to Australia, Mr Khaterly supported the family with income from the clothing shop he inherited from his father. When he sold the shop he left part of the money with his mother to support her and his sisters. Since coming to Australia, Mr Khaterly has regularly sent or taken money back to Kabul for his mother to cover the family's expenses.
47. The Khaterlys claim that Mrs Khaterly and the older children cannot work in Afghanistan because they are women. All the sisters go to school and Mrs Khaterly collects the money sent by Mr Khaterly because the younger women are more likely to be harassed if they go out alone. The Tribunal has considered the information about women in Afghanistan and accepts that neither Mrs Khaterly and her daughters nor Ms Khaterly work. Based on the

³⁵(1992) 37 FCR 194.

³⁶*Huynh v MIMA* [2006] FCAFC 122 at [44].

country information about Hazara education in Kabul it accepts that the sisters are continuing their education. The Tribunal has taken into account the evidence of remittances to Mrs Khately from Mr Khately in Australia and information before it that women who walk outside unaccompanied by a man often experience abuse or harassment, including physical groping, and are likely to be blamed for the assault.³⁷ It accepts Mr Khately is and has been the only source of financial support for Mrs Khately and her children since the disappearance of her husband in 2013.

48. On the basis that Mr Khately owns the Kabul house and has been their sole source of financial support since 2013, the Tribunal finds that at the time of application and for a substantial period immediately before that time, Mrs Khately and her children were wholly or substantially reliant on him for financial support to meet their basic needs for food, clothing and shelter. It finds they were not reliant on any other person or source of support for financial support to meet their basic needs for food, clothing and shelter. At the time of application Mrs Khately and her children were dependent on Mr Khately as defined in the Regulations. Further, at the time of this decision they continue to be wholly or substantially reliant on him, and only him, for financial support to meet their basic needs for food, clothing and shelter. At the time of decision they are dependent on Mr Khately.
49. Based on the findings above the Tribunal finds that at the times of application and decision Mrs Khately and her daughters met and continue to meet r.1.12(1)(e)(iii).

Findings

50. The Tribunal is satisfied that Mrs Khately and her children meet r.1.12(1)(e) and were members of Mr Khately's family unit on 29 December 2014 and that they are members of his family unit at the date of this decision. As a result Mrs Khately and Sabira, Roya, Nargis, Zahra and Kawsar Khately meet cl.309.311, because they made a combined application with Mr Khately and were members of his family unit at the time of the application.
51. The Tribunal has viewed the sponsorship application and is satisfied that Mrs Khately and Sabira, Roya, Nargis, Zahra and Kawsar Khately also meet cl.309.312 because the sponsorship referred to in cl.309.213 of the person who satisfies the primary criteria, being Mr Khately, includes sponsorship of Mrs Khately and her children.
52. Because Mr Khately now holds a Partner (Migrant) (Class BC) Subclass 100 visa, Mrs Khately and her children do not meet cl.309.321(a) at the time of this decision. However, since they made a combined application with Mr Khately, and they were found by the delegate not to be a member of his family unit, and the Tribunal has found them to be members of his family unit they satisfy cl.309.321(b) of the Regulations.
53. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

54. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicants meet the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.31 of Schedule 2 to the Regulations
 - cl.309.321 of Schedule 2 to the Regulations

³⁷ DFAT, *Country Information Report Afghanistan*, 18 September 2017, section 3.42.

Mireya Hyland
Member